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No. 07-___

IN THE

Supreme Court of the United States

KEITH A. OWENS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

Petition for a Writ of Certiorari

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QUESTION PRESENTED

Terry v. Ohio, 392 U.S. 1 (1968), permits a warrantless frisk of an individual only upon reasonable suspicion that the individual is armed and dangerous, and *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979), emphasizes that this reasonable suspicion must be individualized, *i.e.*, "directed at the person to be frisked." A number of jurisdictions, including the Kentucky Supreme Court below, have nonetheless adopted the so-called "automatic companion" rule, under which the police may frisk an individual without individualized reasonable suspicion, based solely on the arrest of the individual's companion. Numerous other jurisdictions have disagreed.

The question presented is:

Does the so-called "automatic companion" rule, under which a police officer may frisk an individual based solely on the arrest of the individual's companion, comport with the Fourth Amendment?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Kentucky Supreme Court were Keith Owens and the Commonwealth of Kentucky.

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INTRODUCTION

OPINIONS BELOW

The opinion of the Kentucky Supreme Court [Pet. App. 1a-15a] is published at 244 S.W.3d 83 (Ky. 2008).

JURISDICTION

The opinion of the Kentucky Supreme Court was rendered on January 24, 2008, and entered as a final decision, pursuant to Kentucky Rule of Civil Procedure 76.30, on February 14, 2008. *See* Pet. App. 1a, 16a. *See also, e.g., Limtiaco v. Camacho*, 127 S. Ct. 1413, 1417-18 (2007). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

INTRODUCTION

The decision below merits this Court's review because it heightens a widespread and entrenched split in the lower courts on a critical Fourth Amendment issue confronted by police officers across the nation on a daily basis, and because it is inconsistent with several decisions of this Court.

This Court has long held that the Fourth Amendment permits *Terry* frisks upon particularized and individualized suspicion that a person is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

The lower circuit and state courts are deeply divided over whether a police officer may automatically conduct a *Terry* frisk of the companion of an arrestee—known generally as the "automatic companion" rule—or, alternatively, whether individualized reasonable suspicion is required. The Fifth, Sixth, and Eighth Circuits and a number of state courts have explicitly rejected the "automatic companion" rule and apply "traditional Fourth Amendment analysis" to ask "whether, in light of the 'totality of the circumstances' surrounding the seizure, it was reasonable for law enforcement personnel to proceed as they did." *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985) (citation omitted). Conversely, in this case the Kentucky Supreme Court joined the Seventh and Ninth Circuits and multiple state courts in adopting the "automatic companion" rule.

In addition to exacerbating this split, the decision below merits this Court's attention because it is inconsistent with this Court's prior decisions. In establishing the permissibility of a *Terry* frisk itself, the Court specifically required that, in order for such a frisk to be permissible under the Fourth Amendment, the officer must be "justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous." *Terry*, 392 U.S. at 24. This instruction has been reaffirmed in later cases explaining that *Terry* "does not permit a frisk for weapons on less than reasonable belief or suspicion *directed at the person to be frisked*," *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (emphasis added).

This is inconsistent with the "automatic companion" rule's endorsement of frisks "even if there is no independent suspicion that the passenger is guilty of criminal conduct." Pet. App. 7a. In addition, contrary to the Kentucky Supreme Court's characterization of a *Terry* frisk as a "minimal" "additional intrusion," Pet. App. 11a, this Court has made clear that a *Terry* frisk is a "serious intrusion upon the sanctity of the person." *Terry*, 392 U.S. at 17.

Furthermore, the question presented is a bedrock Fourth Amendment issue as to which clear guidelines for police officers and a uniform constitutional rule are of the utmost importance, and the issue is squarely and cleanly presented by this case.

Accordingly, this Court's review is warranted.

STATEMENT

On Sept. 10, 2004, Petitioner Keith A. Owens was a passenger in a car driven by Chris Thornton. Pet. App. 2a. A police officer arrested Mr. Thornton for driving with a suspended license, and, in the course of a search incident to arrest, found a suspected crack pipe. *Id.* A second officer arrived while Mr. Thornton was being processed.

Following the arrest, the officer decided to search the car. Petitioner stepped out of the car at the officer's request, and indicated, in response to questioning, that he was not carrying any weapons. *Id.* Although there is no indication "that Owens was acting nervous or was fidgeting...; [that the officer] feared for his safety; [or] that the stop of the vehicle occurred in a high crime area," the officer chose to

conduct a full *Terry* frisk of petitioner. Pet. App. 7a n.14. During the course of this frisk, a small baggie containing marijuana and several pills (two pills were later found to include methamphetamine and three to include ecstasy) was found. Pet. App. 3a.

As a result of this discovery, petitioner was arrested and charged with possession of marijuana, first-degree possession of a controlled substance, and being a first-degree persistent felony offender. Pet. App. 3a-4a. Petitioner moved to suppress the drug evidence on the ground that the officer who frisked lacked reasonable suspicion to justify the frisk, but the trial court, after a hearing, denied the motion. A jury subsequently found Mr. Owens guilty of all charges, and he was sentenced to twenty years' imprisonment.

On direct appeal to the Kentucky Supreme Court, that court affirmed. The court candidly recognized the absence of individualized suspicion concerning petitioner, observing that "nothing of substance appears in the record to justify the frisk of Owens, except . . . that he was a passenger in a vehicle driven by someone who possessed a crack pipe." Pet. App. 7a n.14. Accordingly, the court noted, it was faced with the question whether petitioner's status as the companion of an arrestee could justify the frisk under the Fourth Amendment.

The court noted that this issue has been addressed by numerous jurisdictions and produced "two schools of thought." One view, "known as the automatic companion rule, holds that '[a]ll companions of the arrestee within the immediate

vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory "pat-down" reasonably necessary to give assurance that they are unarmed.'" Pet. App. 7a (quoting *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971)). The other view rejects the automatic companion rule, reasoning, among other things, that the rule "improperly creates a guilt-by-association scenario and obliterates the requirement that an officer have a particularized, reasonable, articulable suspicion that a person is engaging in criminal activity or is dangerous before subjecting that person to a frisk." Pet. App. 8a-9a. In this view, a frisk is permissible only if the officer has reasonable, individualized suspicion under the totality of the circumstances. Pet. App. 9a.

The Kentucky Supreme Court sided with the jurisdictions adopting the automatic companion rule, observing that it seemed "illogical that . . . an officer could search a vehicle incident to an arrest of the driver, which necessitates removing any passengers from the vehicle, but could not take the additional protective step of conducting a *Terry* pat-down" of the passengers. Pet App. 9a-10a. The court termed the "additional intrusion" of such a frisk "minimal—since the passengers presumably have already been ordered to exit the vehicle," and further asserted that excluding evidence in such circumstances would have "no practical deterrent effect." Pet. App. 11a-12a. In addition, the court justified the automatic companion rule as "provid[ing] needed bright line guidance to the bench, bar, law enforcement community, and citizens across the Commonwealth as to what is

constitutionally permissible in cases such as the one at hand." Pet. App. 13a.

REASONS FOR GRANTING THE WRIT

I. THE LOWER FEDERAL AND STATE COURTS ARE DIVIDED OVER WHETHER AN OFFICER MAY AUTOMATICALLY FRISK AN ARRESTEE'S COMPANION WITHOUT INDIVIDUALIZED REASONABLE SUSPICION.

The lower courts are deeply divided over whether a police officer may *automatically* conduct a pat-down search of the companion of an arrestee. Indeed, the decision below explicitly acknowledged that "[t]wo schools of thought have emerged around this subject" and adopted the so-called "automatic companion" rule, joining the minority side of the split. Pet. App. 7a, 9a-13a.

At least three federal courts of appeals—the Fifth, Sixth, and Eighth—have concluded that the Fourth Amendment and this Court's holding in *Terry v. Ohio*, 392 U.S. 1 (1968), bar the automatic pat-down search of an arrestee's companion without individualized reasonable suspicion. The Sixth Circuit, for example, has held that "[a]s to the propriety of the 'automatic companion' rule, we do not believe that the *Terry* requirement of reasonable suspicion under the circumstances has been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates." *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985) (internal citation omitted). Instead, these courts apply "traditional Fourth Amendment analysis," asking "whether, in light of the 'totality of

the circumstances' surrounding the seizure, it was reasonable for law enforcement personnel to proceed as they did." *Id.* (citation omitted).

In contrast, the Seventh and Ninth Circuits have adopted the automatic companion rule, dispensing with the need for individualized suspicion. In *United States v. Berryhill*, 445 F.2d 1189, 1193 (1971), which has become the paradigmatic statement of the automatic companion rule, the Ninth Circuit held that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed."

A. Cases Rejecting the "Automatic Companion" Rule

The Sixth Circuit has consistently rejected *Berryhill*'s automatic companion rule in favor of a totality of the circumstances analysis of the legality of the search at issue. In *United States v. Wilson*, 506 F.3d 488, 496 (6th Cir. 2007), the court granted a motion to suppress brought by the companion of an arrestee because "the government can point to no specific and articulable facts to justify the pat-down of [the companion] on the basis of a reasonable suspicion that he was armed and dangerous." Noting that it rejected the automatic companion rule, the Sixth Circuit concluded that the defendant's "proximity to [the arrestee] was relevant, but not dispositive, to the analysis. . . . [T]his court has held that the government must indeed show additional

factors in order for the search to be constitutional." *Id.* at 494.

Similarly, the Fifth and Eighth Circuits have expressly declined to adopt the automatic companion rule. *United States v. Flett*, 806 F.2d 823, 827 (8th Cir. 1986) ("We decline to adopt the 'automatic companion' rule."); *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc) (rejecting rule "conferring categorical reasonableness upon searches of all companions of the arrestee as being incident to the arrest of the other"), *overruled on other grounds by United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987). Like the Sixth Circuit, these circuits apply a totality of the circumstances analysis, finding that "[i]t is relevant that one member of a group has been arrested, but that does not automatically give rise to a reasonable suspicion that the others may be armed and dangerous." *United States v. Menard*, 95 F.3d 9, 11 (8th Cir. 1996).[1]

A number of state courts have likewise rejected the automatic companion rule, contrary to the Kentucky Supreme Court's decision here. As the

[1] District courts in the Eighth Circuit have continued to adhere to this rejection of the automatic companion rule. *See, e.g., United States v. Bowers*, No. 8:05CR294, 2006 WL 277094, at *5 (D. Neb. Feb. 3, 2006) (requiring reasonable suspicion to search the companion of an arrestee); *United States v. Easley*, No. CR05-4107-MWB, 2006 WL 42149, at *5 (N.D. Iowa Jan. 9, 2006) ("The Eighth Circuit 'expressly rejected the 'automatic companion' rule, requiring instead that the search of a companion of an arrestee be reasonable in the 'totality of the circumstances,' including companionship with the arrestee[.]'") (citation and emphasis omitted).

Supreme Judicial Court of Massachusetts explained, "such a bright-line rule [is] not consistent with the Fourth Amendment principles of *Terry v. Ohio*, under which the frisk of a person is constitutionally permissible if the arresting officer can point to specific, articulable facts that warrant a reasonable suspicion." *Commonwealth v. Ng*, 649 N.E.2d 157, 157 (Mass. 1995) (internal citation omitted). *See also Commonwealth v. Jackson*, 907 A.2d 540, 544 (Pa. Super. Ct. 2006) (rejecting *per se* automatic companion rule); *El-Amin v. Commonwealth*, 607 S.E.2d 115, 118 (Va. 2005) (declining to adopt a *per se* automatic companion rule); *Way v. State*, 101 P.3d 203, 211 (Alaska Ct. App. 2004) ("[T]he police can not frisk a person based simply on that person's 'unfortunate choice of associates.' Rather, 'the predicate to a patdown of a person for weapons is a reasonable belief that [the person] [is] armed and presently dangerous.'" (citations and footnote omitted)); *State v. Jason L.*, 2 P.3d 856, 864 (N.M. 2000) (suppressing the evidence because the police lacked "[i]ndividualized, particularized suspicion[, which] is a prerequisite to a finding of reasonable suspicion"); *Commonwealth v. Graham*, 685 A.2d 132, 136 (Pa. Super. Ct. 1996) ("[A] *per se* rule that a companion to an arrestee is subject to a 'pat-down' search regardless of justification . . . effectively warrants 'unreasonable searches' and is, thus, contrary to the Fourth Amendment . . . ."), *rev'd on other grounds by* 721 A.2d 1075 (Pa. 1998); *State v. Eggersgluess*, 483 N.W.2d 94, 98 (Minn. Ct. App. 1992) ("We believe that the prevailing trend, which rejects the 'automatic companion rule' of *Berryhill* as

unconstitutional and unsound, is a better approach and is consistent with . . . federal constitutional law.").[2]

B. Cases Adopting the "Automatic Companion" Rule

Like the Kentucky Supreme Court below, the Seventh and Ninth Circuits have adopted the automatic companion rule for pat-down searches of an arrestee's companion, reasoning, in essence, that "[i]t is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate. . . ." *Berryhill*, 445 F.2d at 1193. *See also United States v. Prieto-Villa*, No. 91-50505, 1993 WL 222610, at *3 (9th Cir. June 24, 1993) ("[I]n certain circumstances indicating a close personal connection, police officers are justified in briefly detaining and patting-down for weapons someone who is associated with a person or place as to which probable cause exists."). The Seventh Circuit, citing *Berryhill*, has approved the pat-down search of an arrestee's companion, but refused to extend the rule to cover a search of all items with the companion's area of immediate control. *United States v. Simmons*, 567

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[2] One other state appellate court has rejected the automatic companion rule as violating its state constitution. *See State v. Henderson*, 906 A.2d 232, 237-38 (Del. Super. Ct. 2005) ("[T]he Delaware Constitution would not allow for [the automatic companion rule]."). While the Delaware court ultimately rested its conclusions on state law, it was influenced by federal law and suggested that the same result was appropriate under federal law. *See id.* at 237.

F.2d 314, 319 (7th Cir. 1977); *see also, e.g.*, Pet. App. 8a n.16 (placing Seventh Circuit on *Berryhill*'s side of the split).[3]

In addition, in a case decided shortly after *Berryhill*, the Fourth Circuit expressly agreed with *Berryhill* and extended the automatic companion rule to "a limited search for weapons of a known companion of an arrestee, especially one reported to be armed at all times, who walks in on the original arrest." *United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973). But in a more recent case involving the search of the companion of a driver placed under arrest, the Fourth Circuit failed to cite *Poms* and instead required an "appropriate level of suspicion of criminal activity and apprehension of danger." *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir. 1998). Unlike in *Berryhill*, the court concluded that it could "not rely on a generalized risk to officer safety to justify a routine 'pat-down' of all passengers as a matter of course." *Id.* However, the court nonetheless dispensed with the requirement of individualized suspicion, ruling that "when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out

[3] Scholarly articles likewise understand *Simmons* as adopting the automatic companion rule. *See* Jeanne C. Serocke, Note, *The Automatic Companion Rule: An Appropriate Standard to Justify the* Terry *Frisk of an Arrestee's Companion?*, 56 FORDHAM L. REV. 917, 918 n.16 (1988); John J. O'Shea, *The Automatic Companion Rule: A Bright-Line Standard for the* Terry *Frisk of an Arrestee's Companion*, 62 NOTRE DAME L. REV. 751, 755 (1987).

of the vehicle and pat them down briefly for weapons to ensure the officer's safety . . . ." *Id.* Ultimately, the meaning of *Sakyi* with respect to the vitality of the automatic companion rule in the Fourth Circuit remains unclear. *See United States v. Williams*, Nos. 99-4279, 99-4280, 2000 WL 718395, at *7 (4th Cir. June 5, 2000) (case decided after *Sakyi* that cites *Poms* to justify the frisk of an arrestee's companion).

A number of state courts, in addition to the court below, have also adopted the automatic companion rule. *See, e.g., Trice v. United States*, 849 A.2d 1002, 1007 (D.C. 2004) ("[I]mmediate safety concerns . . . will justify the police in stopping, or stopping and frisking, the companion of a person whom the police have reason to seize, even if the police have no particularized suspicion that the companion is armed, dangerous, or engaged in criminal activity."); *Perry v. State*, 927 P.2d 1158, 1163 (Wyo. 1996) ("[The] frisk . . . was lawful under the 'automatic companion' rule."); *People v. Myers*, 616 N.E.2d 633, 636 (Ill. App. Ct. 1993) ("While a police officer may not search a person merely because he is with someone who has been arrested, the officer may conduct a pat-down of the arrested person's companions to protect himself or others."); *State v. Clevidence*, 736 P.2d 379, 382 (Ariz. Ct. App. 1987) ("The right to a limited search for weapons extends to a suspected criminal's companions at the time of arrest."); *State v. Moncrief*, 431 N.E.2d 336, 342 (Ohio Ct. App. 1980) ("The right to frisk for the limited purpose of searching for weapons has been extended to the other occupants of a stopped automobile."); *see also State v. Dougherty*, 493 P.2d

1383, 1385 (Or. 1972) (citing *Berryhill* to justify asking the companion of an arrestee to open her purse for a weapons check).

In short, the split in the lower federal and state courts over the automatic companion rule is deep, acknowledged, and enduring. *See, e.g.*, *Graham*, 685 A.2d at 135 (noting that *Berryhill's* automatic companion rule has "drawn a large amount of criticism"); *Easley*, 2006 WL 42149, at *5 ("[T]he court is mindful of the Eighth Circuit's rejection of the 'automatic companion' rule, by which some courts have held 'all companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed.'"); *Commonwealth v. Riggins*, No. 2001-03-4, 2004 WL 192053, at *3 n.2 (Va. App. Jan. 30, 2004) ("To the extent the Commonwealth invokes an 'automatic companion rule' to justify the search, we note that, although some courts have adopted such a rule, others make clear that the 'totality of circumstances' test does not support it." (internal citations omitted)); *People v. Samples*, 56 Cal. Rptr. 2d 245, 254 & 254 nn. 5, 6 (Cal. Ct. App. 1996); *United States v. McKie*, 951 F.2d 399, 401-02 (D.C. Cir. 1991). The decision below endorsing the automatic companion rule exacerbates this clear conflict.

II. THE KENTUCKY SUPREME COURT'S DECISION IS INCONSISTENT WITH THIS COURT'S CASES.

This Court should also grant review because the Kentucky Supreme Court's decision is inconsistent with this Court's cases narrowly circumscribing the Fourth Amendment exception embodied by *Terry*. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway v. New York*, 442 U.S. 200, 210 (1979).

The lower court's adoption of a bright line automatic companion rule subjecting a passenger to a *Terry* frisk incident to the arrest of the driver—"regardless of whether those passengers' actions or appearance evidenced any independent indicia of dangerousness or suspicion," Pet. App. 15a—is inconsistent with this Court's repeated instruction that the Fourth Amendment requires particularized and individualized suspicion that a person is armed and dangerous as a condition to a *Terry* search. The Fourth Amendment "does not permit a frisk for weapons on less than reasonable belief or suspicion *directed at the person to be frisked*." *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979) (emphasis added). It is only "[w]hen an officer is justified in believing that the *individual whose suspicious behavior he is investigating* . . . is armed and presently dangerous" that a protective frisk is constitutionally permissible. *Terry*, 392 U.S. at 24 (emphasis added).

Nevertheless, the Kentucky court held that a police officer may pat-down a vehicle passenger "even

if the officer has no independent suspicion that the passenger is guilty of criminal conduct," and even while acknowledging that individualized suspicion against petitioner was entirely absent. Pet. App. 1a; *see also* Pet. App. 7a n.14. ("[N]othing of substance appears in the record to justify the frisk of Owens, except for the inarguable fact that he was a passenger in a vehicle driven by someone who possessed a crack pipe.")

Terry further made clear that an officer conducting a *Terry* search must be able to point to "specific and articulable facts" justifying the intrusion. 392 U.S. at 21. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 22 n.18. The automatic nature of the Kentucky court's rule is flatly to the contrary—rather than specific facts, the frisk of the passenger is based on the generalization that the companions of arrested drivers always pose a safety threat to arresting officers. "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons.'" *Ybarra*, 444 U.S. at 93-94.

Moreover, this Court has "generally eschewed bright-line rules in the Fourth Amendment context," *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997), and has expressly noted the inappropriateness of an automatic rule in performing the *Terry* analysis. *Michigan v. Long*, 463 U.S. 1032 (1983), held that even when the driver is not arrested, a limited *Terry* search of the passenger compartment of an automobile is permissible if the officer possesses a reasonable belief based on specific and articulable

facts that the suspect is dangerous and may gain immediate control of weapons. In emphasizing that the decision did not establish a bright line rule allowing police to conduct automobile searches whenever they conduct an investigative stop, the court distinguished the automatic rule of *New York v. Belton,* 453 U.S. 454 (1981): "An additional interest exists in the arrest context, *i.e.*, preservation of evidence, and this justifies an 'automatic' search. However, that additional interest does not exist in the *Terry* context." *Long,* 463 U.S. at 1049 n.14. Likewise, there is no additional interest beyond the *Terry* context that can justify an "automatic" search of a passenger in a car whose driver is being arrested.[4]

Furthermore, the view that a pat-down is anything other than a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment" has been clearly rejected by this Court. *Terry,* 392 U.S. at 17. In fact, *Terry* noted it was "simply fantastic" to describe a pat-down as a "petty indignity." *Id.* at 16-17. Thus, a key premise of the Kentucky court's decision, that "[a]lthough a *Terry* pat-down may be considered an additional intrusion into the privacy of a passenger, any additional intrusion is minimal—since the passengers presumably have already been

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[4] Needless to add, any argument that a passenger can automatically be subjected to a full search incident to a driver's arrest is foreclosed by *United States v. Di Re,* 332 U.S. 581, 587 (1948) (rejecting an evidentiary search of a passenger's person based merely on presence in vehicle when driver is arrested).

ordered to exit the vehicle," Pet. App. 11a, conflicts with *Terry*'s statement that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry*, 392 U.S. at 24-25.

In short, the Kentucky Supreme Court's adoption of the automatic companion rule conflicts with this Court's cases establishing that the Fourth Amendment requires individualized suspicion before an individual may be subjected to the significant intrusion of *Terry* search.

III. THE ISSUE IN CONFLICT IS WELL PRESENTED BY THIS CASE

This case presents the automatic companion rule on which the lower courts are divided in an ideal posture, following a Kentucky Supreme Court opinion that "[gave] careful analysis to the well-reasoned thoughts expressed by both proponents and opponents of the automatic companion rule." Pet. App. 9a.

Most importantly, the court below made clear that the automatic companion rule was the *only* basis on which the frisk of petitioner (and, consequently, petitioner's conviction) could be upheld. Pet. App. 7a n.14 ("nothing of substance appears in the record to justify the frisk of Owens, *except* for the inarguable fact that he was a passenger in a vehicle driven by someone who possessed a crack pipe") (emphasis added). As the court noted, there was no "independent suspicion that [Owens was] guilty of

criminal conduct," and the arresting officer had no "articulable and independent suspicions that Owens was armed or dangerous." *Id.* Furthermore, the permissibility of the arresting officers' actions prior to the frisk are unchallenged—as the court explicitly notes—"every important action taken up to the point where Owens was frisked was constitutionally permissible," Pet. App. 6a—thereby placing the permissibility of the frisk squarely in issue.

Moreover, whether officers may automatically frisk an individual based solely on the arrest of the individual's companion is a critical Fourth Amendment issue that police repeatedly confront. Until this Court provides a clear rule, persons cannot be guaranteed the full protections of the Fourth Amendment nor can police officers be sure their actions fully comport with the Fourth Amendment. *See, e.g., New York v. Belton*, 453 U.S. 454, 459-60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."); *see also* Wayne LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. REV. 127, 142 ("the protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.").

Finally, it is clear that this issue will not benefit from further percolation. As the lower court's opinion makes clear, the automatic companion rule is the subject of an entrenched split in the Circuits and states that has not been ameliorated over time. It cannot be settled without this Court's review.

CONCLUSION

The petition for certiorari should be granted.

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May 13, 2008

SUPREME COURT OF KENTUCKY.

Keith A. OWENS, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.
No. 2006-SC-000037-MR.

Rendered Jan. 24, 2008.
Final Feb. 14, 2008.

On Appeal from Taylor Circuit Court Honorable
Doughlas M. George, Judge
No. 04-CR-00225

Opinion of the Court by Justice MINTON.

This appeal requires us to decide whether a police officer working a traffic stop may exercise discretion to conduct a pat-down search for weapons of a vehicle's passenger who exited the vehicle to accommodate a search of the vehicle incident to the driver's arrest, even if the officer has no independent suspicion that the passenger is guilty of criminal conduct. Analyzing the automatic companion rule as a matter of first impression in Kentucky, we conclude that officer safety and public safety demand that the police officer have discretion to frisk the passenger under these circumstances. This conclusion leads us to hold that the trial court properly denied the passenger's motion to suppress evidence of contraband seized from him and to affirm his conviction.

I. FACTUAL AND PROCEDURAL HISTORY

Awaiting trial on charges of possession of marijuana, first-degree possession of a controlled substance, and of being a first-degree persistent felony offender (PFO 1), Keith Owens filed a pretrial motion to suppress evidence of illegal drugs seized during an allegedly improper search of his person. This prompted the trial court to hold a brief suppression hearing at which the Commonwealth presented the testimony of the arresting officer. Owens testified at the hearing in his own behalf.

According to the officer's testimony, he stopped a vehicle driven by Chris Thornton because he believed-correctly it turned out-that Thornton's driver's license had been suspended. Thornton was arrested on that charge. Once outside the vehicle, Thornton was searched incident to arrest. The search yielded a suspected crack pipe, and Thornton was placed in the police cruiser. Owens was a front-seat passenger in the vehicle.[1]

The officer decided to search the vehicle at the scene incident to Thornton's arrest and directed Owens to step out of the vehicle. The officer asked Owens if he had any weapons. The officer testified that Owens stated that he had nothing to hide and began removing money from his pockets. The officer saw a baggie fall out when Owens pulled money from

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[1] Apparently, the vehicle was actually Owens's; but Owens did not want to drive because he had taken prescription codeine for bronchitis.

one of his pockets. That baggie, which the officer testified he immediately suspected contained contraband as it landed at Owens's feet, contained a marijuana cigarette, some loose marijuana, and several pills. Two of the pills were later determined to contain methamphetamine, and three of them were later determined to contain ecstasy. The officer testified at the suppression hearing that Owens voluntarily emptied his own pockets and that he had fully completed a Terry[2] pat-down when Owens emptied his pockets. But the officer also testified, seemingly contradictorily, that Owens began removing money from his pockets while the officer was conducting the pat-down. A later search of the vehicle and Owens's person revealed no other contraband.

At the suppression hearing, Owens's version of the events differed slightly from the officer's. Owens did not dispute the officer's testimony about the stop of the vehicle and Thornton's arrest. But Owens testified that the officer reached into his pockets to remove the money. Owens also denied that he possessed the baggie containing the illegal drugs.

The trial court denied the motion to suppress. At trial, the jury found Owens guilty of all charges and recommended a sentence of twelve months with a $500 fine for the possession of marijuana conviction, and a twenty-year sentence for the PFO 1

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[2] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

conviction.[3] Owens was sentenced in accordance with the jury's recommendation,[4] after which he filed this matter-of-right appeal.[5]

II. ANALYSIS

Owens does not contest the stop of the vehicle. Nor does he contest the arrest and eventual search of Thornton. Owens contends that the officer overstepped constitutional bounds when he frisked him for weapons. We disagree.

Motions to suppress are governed by Kentucky Rules of Criminal Procedure (RCr) 9.78. That rule provides that a court facing a motion to suppress "shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." When reviewing an order on a motion to suppress, the trial court's findings of fact are "conclusive" if they are "supported by substantial evidence."[6] Using those facts, this Court then reviews de novo the trial court's

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[3] Neither the jury nor the trial court assessed a separate penalty for the possession of a controlled substance conviction. Owens does not claim error in the failure to assess a separate penalty for the underlying controlled substance conviction.

[4] The final judgment makes no mention of the possession of marijuana conviction.

[5] *See* Ky. Const. § 110(2)(b).

[6] RCr 9.78.

application of the law to those facts to determine whether its decision is correct as a matter of law.[7]

Under our settled jurisprudence, "[i]t is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule that a search must be made pursuant to a valid warrant."[8]

The officer had a right to stop the vehicle based on his reasonable suspicion that Thornton's driver's license had been suspended.[9] And the officer had the authority to arrest Thornton[10] and to conduct

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[7] *See Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky.1998) ("When the findings of fact are supported by substantial evidence, as we conclude they are herein, the question necessarily becomes, 'whether the rule of law as applied to the established facts is or is not violated[,]' "*citing Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996), in which the United States Supreme Court stated that trial court's determination of reasonable suspicion or probable cause was subject to de novo review even though findings of fact were supported by substantial evidence.).

[8] *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky.1992).

[9] *See, e.g., Collins v. Commonwealth*, 142 S.W.3d 113, 115 (Ky.2004) (citing *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, 673 (1979)).

[10] Kentucky Revised Statutes (KRS) 186.620(2) provides that a person shall not operate a motor vehicle on a suspended license. KRS 186.990(3) provides that a person who violates KRS 186.620 commits a Class B misdemeanor. KRS 431.005(1) authorizes a peace officer to arrest a person without a warrant if that person has committed a misdemeanor in the officer's presence.

a search of Thornton incident to that arrest.[11] Once Thornton was lawfully arrested, the officer had the authority to search the passenger compartment of the vehicle Thornton had recently driven.[12] And an officer has the authority to order a passenger to exit a vehicle pending completion of a minor traffic stop.[13] So it logically follows that an officer may order a passenger to exit a vehicle while that vehicle is searched incident to the lawful arrest of the driver. It appears that every important action taken up to the point where Owens was frisked was constitutionally permissible.

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[11] *See, e.g., Rainey v. Commonwealth*, 197 S.W.3d 89, 92 (Ky.2006) (plurality opinion), *cert. denied*--- U.S. ----, 127 S.Ct. 1005, 166 L.Ed.2d 713 (2007) (search incident to arrest is exception to warrant requirement).

[12] *Thornton v. United States*, 541 U.S. 615, 623, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004).

[13] *Maryland v. Wilson*, 519 U.S. 408, 414-15, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) ("In summary, danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop."). At the suppression hearing, the officer testified that Owens voluntarily exited the vehicle; but Owens testified that the officer asked him to exit the vehicle. Since the officer had the authority to order Owens to exit the vehicle, it is, for purposes of this case, immaterial whether Owens voluntarily exited the vehicle or whether the officer ordered him to do so.

Here we arrive at the crux of this case: may an officer conduct a pat-down search for weapons of a passenger of a vehicle when the driver has been arrested and the driver possessed illegal narcotics even if there is no independent suspicion that the passenger is guilty of criminal conduct?[14] This precise factual scenario appears to be a matter of first impression in Kentucky. So we turn to other courts for guidance.

Two schools of thought have emerged around this subject. One, known as the automatic companion rule, holds that "[a]ll companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory 'pat-down' reasonably necessary to give assurance that they are unarmed."[15] Numerous state and federal courts have

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[14] The officer did not testify that Owens was acting nervous or was fidgeting with anything in his pockets; the officer did not testify that he conducted the frisk because he feared for his safety, either because he was aware of Owens's lengthy criminal history or because Owens was wearing baggy clothes that could have easily concealed a weapon; and the officer did not testify that the stop of the vehicle occurred in a high crime area. In short, nothing of substance appears in the record to justify the frisk of Owens, except for the inarguable fact that he was a passenger in a vehicle driven by someone who possessed a crack pipe. Although further questioning may have revealed that the officer did, in fact, have articulable and independent suspicions that Owens was armed or dangerous, those reasons were not explicitly brought forth during the brief suppression hearing.

[15] *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir.1971).

either expressly adopted the automatic companion rule or have issued decisions that seem to follow its contours.[16] The other school of thought, also used by several courts, is the totality of the circumstances rule in which the propriety of the frisk is determined considering the totality of the circumstances.[17] Some

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[16] *See, e.g., United States v. Simmons*, 567 F.2d 314, 319 (7th Cir.1977) (holding that the automatic companion rule, as expressed in *Berryhill*, was insufficient to justify a full-blown search of an arrestee's companion; but the rationale "may be sufficient where a search is limited to a 'pat down....' "); *United States v. Poms*, 484 F.2d 919, 922 (4th Cir.1973) (voicing agreement with *Berryhill*);*State v. Clevidence*, 153 Ariz. 295, 736 P.2d 379, 382 (1987) (citing *Berryhill* with approval for proposition that "[t]he right to a limited search for weapons extends to a suspected criminal's companions at the time of arrest."); *People v. Myers*, 246 Ill.App.3d 542, 186 Ill.Dec. 443, 616 N.E.2d 633, 636 (1993) (citing *Berryhill* with approval and holding that "[w]hile a police officer may not search a person merely because he is with someone who has been arrested, the officer may conduct a pat-down of the arrested person's companions to protect himself or others."); *State v. Moncrief*, 69 Ohio App.2d 51, 431 N.E.2d 336, 342 (1980) (citing *Berryhill* with approval); *Lewis v. United States*, 399 A.2d 559, 562 (D.C.1979) (citing *Berryhill* with approval). *Perry v. State*, 927 P.2d 1158, 1163-64 (Wyo.1996) (citing *Berryhill* with approval and adopting automatic companion rule).

[17] *See, e.g., United States v. Bell*, 762 F.2d 495, 499 (6th Cir.1985) (rejecting adoption of automatic companion rule); *Eldridge v. State*, 848 P.2d 834, 837-38 (Alaska Ct.App.1993) (same); *Commonwealth v. Ng*, 420 Mass. 236, 649 N.E.2d 157, 158 (1995) (same); *State v. Eggersgluess*, 483 N.W.2d 94, 98 (Minn.Ct.App.1992); *United States v. Flett*, 806 F.2d 823, 827 (8th Cir.1986) (same). We appear to have utilized the totality of the circumstances test in regards to judging the propriety of *Terry* stops. *See, e.g., Commonwealth v. Priddy*, 184 S.W.3d

courts that have rejected the automatic companion rule appear to believe that it improperly creates a guilt-by-association scenario and obliterates the requirement that an officer have a particularized, reasonable, articulable suspicion that a person is engaging in criminal activity or is dangerous before subjecting that person to a frisk.[18] Legal scholars have also entered the debate.[19]

We have given careful analysis to the well-reasoned thoughts expressed by both proponents and opponents of the automatic companion rule. We have decided to adopt the automatic companion rule in the narrow realm of cases involving facts similar to the case at hand.

We find it illogical that rejecting the automatic companion rule would lead to scenarios whereby an officer could search a vehicle incident to an arrest of

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501, 511 (Ky.2005), *cert. denied*--- U.S. ----, 127 S.Ct. 444, 166 L.Ed.2d 316 (2006). However, we have not directly opined on the merits, or lack thereof, of the automatic companion rule.

[18] *See, e.g., Eldridge*, 848 P.2d at 838;Ng, 649 N.E.2d at 157.

[19] *See* Kristi Michelle Bellamy, *The "Automatic Companion" Rule and Its Unconstitutional Application to the Frisk of Car Passengers*, 27 AM.J.CRIM.L. 217 (2000); David E. Edwards, Suzette M. Nanovic, Francis M. O'Connell & Laura A. Yustak, Case Comment, *Criminal Law-United States v. Bell: Rejecting Guilt By Association in Search and Seizure Cases*, 61 NOTRE DAME L.REV. 258 (1986). John. J. O'Shea, *The Automatic Companion Rule: A Bright Line Standard for the Terry Frisk of an Arrestee's Companion*, 62 NOTRE DAME L.REV. 751 (1987).

the driver, which necessitates removing any passengers from the vehicle, but could not take the additional protective step of conducting a *Terry* pat-down for weapons of those passengers (unless the officer had independent reasons to suspect the passengers of being dangerous or of being involved in criminal activity). Limiting the right to a make a protective search would increase the chances that an officer could be harmed by a passenger who had been carrying a concealed weapon.[20] This "compelling"[21] concern for officer safety is magnified by the fact that this case, like so many others, involves illegal narcotics, thereby bringing into play "[t]he indisputable nexus between drugs and guns[, which] presumptively creates a reasonable suspicion of danger to the officer."[22] Indeed, even the United States Supreme Court has recognized the safety of officers as a matter of paramount importance.[23] And

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[20] *Berryhill*, 445 F.2d at 1193 ("We think that *Terry* recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest. *It is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance.*") (emphasis added).

[21] *Perry*, 927 P.2d at 1164 ("The concern of these courts [who have adopted the automatic companion rule] for officer safety is a compelling justification.").

[22] *United States v. Sakyi*, 160 F.3d 164, 169 (4th Cir.1998).

[23] *See Terry*, 392 U.S. at 23-24, 88 S.Ct. at 1881 ("Certainly it would be unreasonable to require that police officers take

given the small space inside a vehicle and the general presumption that one voluntarily chooses one's traveling companions for the furtherance of a common goal or mission,[24] it would be unreasonable and dangerous for an officer not to be concerned about his or her safety with regard to the passengers of a vehicle after the driver has been arrested.[25]

Although a *Terry* pat-down may be considered an additional intrusion into the privacy of a passenger, any additional intrusion is minimal—since the passengers presumably have already been ordered to exit the vehicle-and is more than counterbalanced by the need to protect both the officers and any innocent bystanders from harm.[26]

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unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives."). *See also Sakyi*, 160 F.3d at 168 ("All of these cases recognize generally that every traffic stop poses a meaningful level of risk to the safety of police officers").

[24] That general presumption of voluntary traveling together for the furtherance of a common purpose is heightened in this case by the fact that Owens asked Thornton to drive Owens's vehicle.

[25] *Sakyi*, 160 F.3d at 169 ("They [passengers of a vehicle] are in the restricted space of the vehicle presumably by choice and presumably on a common mission.").

[26] *See* O'Shea, 62 NOTRE DAME L.REV. at 759 (citing statistics regarding accidental shootings by Chicago police and arguing

After all, a protective frisk of a passenger by an officer is just that: a mechanism designed solely to protect the officers and any bystanders, not an offensive move designed to result in prosecution of a passenger.[27] Thus, since the officer's motive in conducting the frisk (safety) is not improper or designed to circumvent the protections afforded by the Fourth Amendment, the basic purpose of the exclusionary rule-deterring police misconduct[28]—would not be furthered by denying the officer the right to conduct a brief *Terry* frisk of a passenger in a vehicle whose driver has just been arrested. In other words, penalizing the officer for conducting what a court later determines to have been an improper frisk will have absolutely no practical deterrent effect, meaning that suppression of the evidence will not further the aims of the exclusionary rule.[29]

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that adoption of automatic companion rule would reduce those shootings while simultaneously protecting the police).

[27] *See id.* at 754.

[28] *See, e.g., Parks v. Commonwealth*, 192 S.W.3d 318, 335 (Ky.2006) ("The exclusionary rule is designed to deter police misconduct.").

[29] O'Shea, 62 NOTRE DAME L.REV. at 753 ("The officer who fears for his safety is not concerned with the admissibility of evidence found pursuant to a pat-down search. Instead, the officer is protecting himself and those around him by conducting a pat-down search for weapons."); *Terry*, 392 U.S. at 14-15, 88 S.Ct. at 1876 ("Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is

Additionally, adoption of the automatic companion rule provides needed bright line guidance to the bench, bar, law enforcement community, and citizens across the Commonwealth as to what is constitutionally permissible in cases such as the one at hand. The United States Supreme Court, along with commentators, has endorsed bright line rules in dealing with other Fourth Amendment concerns.[30]

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powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.... Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.") (internal footnote omitted).

[30] *See, e.g., New York v. Belton*, 453 U.S. 454, 459-60, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."); LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S.CT.REV. 127, 142 ("Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of

We are not unmindful of the powerful protections afforded by the Fourth Amendment. In no sense should our holding in this case be taken as a license for law enforcement officers to believe that all frisks of all persons are always proper. We also reject any implication that our holding creates a "guilt by association" mentality. To the contrary, our holding is simply an avenue to protect the officer working at the point of contact and the public. Toward that end, our holding is a limited and narrow exception to the exclusionary rule, designed to apply only in situations in which the driver of a vehicle has been lawfully arrested and the passengers of the vehicle have been lawfully expelled in preparation for a lawful search of the vehicle.[31] Only in those limited circumstances, which are fraught with danger for officers and bystanders alike, may an officer conduct a brief pat-down for weapons (not a full-blown

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application by the officer in the field.' ") (as quoted in *Belton*, 453 U.S. at 458, 101 S.Ct. at 2863); O'Shea, 62 NOTRE DAME L.REV. at 760 ("The [automatic companion] doctrine would provide police officers with a bright line rule as to when they could search companions. The automatic companion rule, even though a bright line rule (which historically decreases a police officer's discretion), would allow police officers some discretion. An officer would not have to frisk every companion-but he would have that option. He could protect his life by using his own discretion.").

[31] We express no opinion about whether a protective pat-down of a passenger may occur if the driver is only detained, not arrested.

search) of the vehicle's passengers, regardless of whether those passengers' actions or appearance evidenced any independent indicia of dangerousness or suspicion.

Applying our holding regarding the automatic companion rule to the case at hand leads to the conclusion that the trial court did not err when it denied Owens's motion to suppress. Therefore, we affirm Owens's conviction and sentence.

III. CONCLUSION

For the foregoing reasons, the judgment of the Taylor Circuit Court is affirmed.

All sitting. LAMBERT, C.J.; ABRAMSON, CUNNINGHAM, and SCOTT, JJ., concur. NOBLE and SCHRODER, JJ., concur but would emphasize that there must be a lawful stop, lawful arrest, and lawful expulsion of occupants from the vehicle in order to avoid suppression of the evidence as fruit of the poisonous tree.

RENDERED: JANUARY 24, 2008
TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 2-14-08

2006-SC-000037-MR

KEITH A. OWENS — APPELLANT

V.

ON APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
NO. 04-CR-00225

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE MINTON

AFFIRMING

This appeal requires us to decide whether a police officer working a traffic stop may exercise discretion to conduct a pat-down search for weapons of a vehicle's passenger who exited the vehicle to accommodate a search of the vehicle incident to the driver's arrest, even if the officer has no independent suspicion that the passenger is guilty of criminal conduct. Analyzing the automatic companion rule as a matter of first impression in Kentucky, we conclude that officer safety and public safety demand that the police officer have discretion to frisk the passenger under these circumstances. This conclusion leads us to hold that the trial court properly denied the passenger's motion to suppress evidence of contraband seized from him and to affirm his conviction.

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No. 07-1411

Supreme Court of the United States

KEITH A. OWENS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this court should review the "automatic companion" rule, as adopted in some jurisdictions. The issue is not well presented in the present case, however, because there is an independent ground to justify the seizure of the drugs: The arresting officer had completed the *Terry* frisk, but Owens afterward voluntarily removed items from his pocket, and the drugs fell onto the ground, in plain view.

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STATEMENT OF THE CASE

On September 10, 2004, Officer Jermaine Kilgore was driving on North Columbia Street in Campbellsville, Kentucky, when he observed Chris Thornton walk out of his house and enter Keith Owens' vehicle, which was parked on House Street. (VR No. 1: 10/31/05; 10:17:00). Officer Kilgore suspected that Thornton's driver's license was suspended. (VR No. 1: 10/31/05; 10:19:32). Officer Kilgore followed him for awhile and radioed in for a check on Thornton's license. (VR No. 1: 10/31/05; 10:19:40). Upon learning that Thornton's license was suspended, Officer Kilgore activated the emergency equipment on his cruiser. (VR No. 1: 10/31/05; 10:20:46). Thornton stopped on North Columbia. (VR No. 1: 10/31/05; 10:20:46).

Upon approaching the vehicle, Thornton admitted that his license was suspended. (VR No. 1: 10/31/05; 10:21:45).

Officer Kilgore routinely performs a search incident to a lawful arrest. (VR No. 1: 10/31/05; 10:26:18). Thornton told Officer Kilgore that he had a crack pipe in his pocket. (VR No. 1: 10/31/05, 10:27:05). Thornton removed the crack pipe from inside his left front pocket and handed it to Officer Kilgore. (VR No. 1: 10/31/05, 10:27:10).

Officer Kilgore handcuffed Thornton and placed him into the rear of his cruiser. (VR No. 1: 10/31/05; 10:28:33).

Officer Kilgore then approached the passenger window where Owens was seated. (VR No. 1: 10/31/05; 10:29:36). Officer Kilgore had intended to search the entire vehicle as a "search incident to arrest," so he asked Owens to exit the vehicle. (VR No. 1: 10/31/05; 10:29:49). As Owens stepped out of the vehicle, Officer

Kilgore asked Owens whether he "had anything on him that shouldn't be on him." (VR No. 1: 10/31/05; 10:29:56). Owens stated that he "had nothing to hide." (VR No. 1: 10/31/05; 10:30:04). Without being asked to do so, Owens reached into his left front pocket and pulled out some money. (VR No. 1: 10/31/05; 10:30:05, 10:33:15). He then returned the money to his left front pocket. (VR No. 1: 10/31/05; 10:30:14). He then reached into his right front pocket and pulled out money. (VR No. 1: 10/31/05; 10:30:26). As he lifted his right hand, a small baggie containing three blue tablets and two green tablets fell onto the ground. (VR No. 1: 10/31/05; 10:30:28, 10:37:20). Officer Gilpin, who had arrived as backup, picked up the baggie from the ground. (VR No. 1: 10:31/05; 10:34:43). Officer Kilgore arrested Owens, charging him with possession of a controlled substance. (VR No. 1: 10/31/05; 10:41:08).

Det. Patricia Thompson, the evidence officer for the Campbellsville Police Department, delivered the contents of the small baggie to the Kentucky State Police Crime Laboratory in Frankfort, where it was examined by William E. Bowers, III, a forensic scientist specialist. (VR No. 1: 10/31/05; 11:52:18, 11:53:49, 12:04:20). Bowers determined that the blue tablets were, in fact, methamphetamine and that the green tablets were 3,4-methylenedioxymeth-amphetamine (also known as ecstacy), which under Kentucky law, are Schedule I and Schedule II controlled substances. (VR No. 1: 10/31/05; 12:18:04).

On November 5, 2004, the grand jury of the Taylor Circuit Court indicted Owens, charging him with (1) possession of a controlled substance in the first

degree; (2) possession of less than eight ounces of marijuana; and (3) being a persistent felony offender in the first degree. (T.R., p. 1). On October 31, 2005, Owens was tried before a jury of the Taylor Circuit Court, which found him guilty of all three charges. (T.R., pp. 85-93). On November 22, 2005, the Taylor Circuit Court entered judgment against Owens, sentencing him to imprisonment for a total of twenty years. (T.R., pp. 132-35). From these convictions, Owens appealed to the Kentucky Supreme Court, which affirmed his convictions on January 24, 2008. *Owens v. Commonwealth*, 244 S.W.3d 83 (2008).

Owens now seeks a writ of *certiorari* from this court.

REASONS FOR DENYING THE WRIT

I.

OFFICER KILGORE HAD SUFFICIENT "REASONABLE SUSPICION" TO STOP THORNTON, AND HE PROPERLY SEIZED THE DRUGS WHICH FELL ONTO THE GROUND WHEN OWENS VOLUNTARILY EMPTIED HIS POCKETS.

As his only ground for seeking *certiorari*, Owens argues that the Kentucky courts erred by overruling his motion to suppress evidence as the police did not have reasonable suspicion to stop and frisk him. The Commonwealth disagrees because some of the federal circuit courts of appeal have ruled that the very nature of drug activity inherently gives police officers a reasonable concern for their personal safety, and the

pat down search of passenger Owens was constitutionally justifiable. Perhaps more importantly, Officer Kilgore did not discover the drugs during the pat down but, instead, observed them fall from Owens' pocket onto the ground.

On December 29, 2004, Owens filed a motion to suppress evidence, arguing that the police did not have reasonable suspicion to stop him. (T.R., pp. 30-31). On May 3, 2005, the trial court conducted a hearing on the motion to suppress. (VR No. 1, 05/03/05; 13:26:52 through 13:42:37).

During the hearing, Officer Kilgore testified that he stopped Thornton after verifying with his radio dispatcher that Thornton's driver's license was suspended for a DUI conviction. (VR No. 1, 05/03/05; 13:27:42). After Thornton produced a crack pipe, Officer Kilgore arrested him. (VR No. 1, 05/03/05; 13:27:50). Officer Kilgore placed Thornton in the rear of his cruiser. (VR No. 1, 05/03/05; 13:29:42). When Officer Kilgore decided to search the car, incident to the arrest, he asked Owens to exit the car, "I just told him I wanted to talk to him, and he stepped out." (VR No. 1, 05/03/05; 13:28:15, 13:30:48, 13:33:45). Officer Kilgore asked Owens whether he had any weapons on him. (VR No. 1, 05/03/05; 13:28:20). Officer Kilgore then performed a *Terry* pat down search of Owens, who said that he had nothing to hide. (VR No. 1, 05/03/05; 13:28:23). Officer Kilgore testified that Owens was not under arrest at the time. (VR No. 1, 05/03/05; 13:31:13). During the pat down, with his back toward Kilgore, Owens removed money out of his left pocket, then with his left hand returned the money to his left pocket. (VR No. 1, 05/03/05;

13:28:34). With his right hand, Owens then removed money from his right pocket. (VR No. 1, 05/03/05; 13:28:38). Significantly, the following testimony was adduced at the suppression hearing:

> Prosecutor: Was he [Owens] emptying his pockets at your request?
>
> Officer Kilgore: No, sir, he did them on his own.
>
> Prosecutor: Okay. Had you already done the *Terry* frisk?
>
> Officer Kilgore: Yes, sir.

(VR No. 1, 05/03/05, 13:30:07 through 13:30:16). While removing items from his right pocket, the baggie containing drugs fell out onto the ground. (VR No. 1, 05/03/05; 13:28:42). Officer Gilpin, who had arrived as backup, picked up the baggie from the ground. (VR No. 1, 05/03/05; 13:28:48).

Owens testified in his own behalf and agreed with most of Officer Kilgore's testimony. (VR No. 1, 05/03/05; 13:38:20). Owens denied that he had removed items from his own pockets and, instead, claimed that Officer Kilgore reached into his pockets. (VR No. 1, 05/03/05; 13:38:47, 13:40:30). Owens claimed that no pills came from his pocket. (VR No. 1, 05/03/05; 13:40:48).

At the conclusion of the hearing, the trial judge denied the motion to suppress. (VR No. 1, 05/03/05; 13:42:37). The trial judge specifically ruled that the stop was valid and that the other issues were up to the jury to decide. (VR No. 1, 05/03/05; 13:41:33).

1. In his petition, Owens appears to concede Officer Kilgore had reasonable suspicion to stop the vehicle

which Thornton was driving because Officer Kilgore recognized Thornton and confirmed his suspicion, through a radio check, that Thornton's driver's license was suspended. In *Terry v. Ohio,* 392 U.S. 1 (1968), this court defined "reasonable suspicion" as follows:

> We merely hold today that where a police officer observes **unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot** and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id., 392 U.S. at 30-31, emphasis added. This court further stated:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with

> rational inferences from those facts, reasonably warrant that intrusion.
>
> * * *
>
> And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Id., 392 U.S. at 21-22.

In *Delaware v. Prouse*, 440 U.S. 648 (1970), this court specifically held that a police officer may stop a vehicle:

> [I]n those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law.

Id., 440 U.S. at 663, emphasis added.

2. In his petition, Owens also appears to concede that, once Thornton produced the crack cocaine pipe, Officer Kilgore had probable cause to arrest Thornton after seeing the pipe, which at that point, was in "plain view." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

3. In his petition, Owens also appears to concede that once Officer Kilgore had arrested Thornton,

Officer Kilgore had the authority to search Thornton's entire vehicle, incident to the lawful arrest. In *New York v. Belton,* 453 U.S. 454 (1981), this court ruled, "when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest." *Belton,* 453 U.S. 623-24. In *Thornton v. United States,* 541 U.S. 615 (2004), this court ruled that an officer can search the passenger compartment of a vehicle incident to a lawful arrest of a "recent occupant," acknowledging this to be a natural extension of *Belton. Thornton,* 517 U.S at 617.

4. Officer Kilgore testified that he simply told Owens that he needed to talk with him and then asked Owens to step outside of the vehicle. (VR No. 1, 05/03/05; 13:33:46). In his petition, Owens appears to concede that Officer Kilgore had the authority to order Owens out of the vehicle. In *Maryland v. Wilson,* 519 U.S. 408 (1997), this court ruled as follows:

> In summary, danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.

Id. 519 at 414.

5. The only issue raised in Owens' petition is whether Officer Kilgore had the lawful authority to perform a pat down search to protect his own safety, once Owens exited the vehicle. In his petition, Owens appears to acquiesce that Officer Kilgore had reasonable suspicion to stop the vehicle and to arrest Thornton. Owens' only complaint is that the police officer did not have reasonable suspicion to stop and frisk him. (Petition, pp. 6-10). During the suppression hearing, Officer Kilgore explained why he performed the pat down search, as follows:

> Officer Kilgore: As I went around to his side of the door [sic], he stepped out. As he was getting out of the car, I asked Keith [Owens] whether he had any weapons on him, whether he had anything on him, and he said no. So I asked him to turn around, and I patted him down, *Terry* frisk. As I was patting him down, Keith said that he had nothing to hide. So he started pulling — He pulled a large amount of money out of his left pocket. As he got that out, he pulled a large amount of money from his right pocket. As he was pulling that money out, a small baggie fell on the ground.

(VR No. 1, 05/03/05; 13:28:14 through 13:28:42).

The *New York v. Belton* exception to the search warrant requirement permits a police officer to search the entire contents of a vehicle, incident to a lawful arrest. In *United States v. Di Re*, 332 U.S. 581 (1948), this court ruled that officers may not search the persons of occupants of a vehicle, incident to the arrest

of the driver. However, an important distinction must be drawn, because the federal courts have so far permitted a police officer to perform a *Terry v. Ohio* frisk of passengers for weapons, for the purpose of protecting his own safety. In *Maryland v. Wilson,* this court, relying on the same public interest in police safety, held that police officers making lawful traffic stops could require passengers to step out of the vehicle as a matter of course, stating that the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Id.* 519 U.S. at 413-14.

The precise question presented in the present appeal was addressed in *United States v. Sakyi,* 160 F.3d 164 (4th Cir. 1998), wherein the Fourth Circuit ruled as follows:

> We must now decide, in light of these authorities, what justification a police officer must have to conduct a 'pat-down' for weapons of a passenger in a lawfully stopped vehicle.
>
> * * *
>
> The holdings in *Terry* and *Long* permitted frisks only when the officer perceived an appropriate level of suspicion of criminal activity and apprehension of danger, and we conclude that such a showing is necessary here. That showing, however, may be satisfied by an officer's objectively reasonable suspicion that drugs are present in a vehicle that he lawfully stops. Moreover, when drugs are suspected in a

> vehicle and the suspicion is not readily attributable to any particular person in the vehicle, it is reasonable to conclude that all occupants of the vehicle are suspect. They are in the restricted space of the vehicle presumably by choice and presumably on a common mission. Furthermore, as we have previously noted, guns often accompany drugs. *See Stanfield,* 109 F.3d at 984; *United States v. Perrin,* 45 F.3d 869, 873 (4th Cir.1995) (noting that 'it is certainly reasonable for an officer to believe that a person engaged in selling of crack cocaine may be carrying a weapon for protection'). In the absence of ameliorating factors, the risk of danger to an officer from any occupant of a vehicle he has stopped, when the presence of drugs is reasonably suspected but probable cause for arrest does not exist, is readily apparent.
>
> *Accordingly, we hold that in connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others.*

Id. at 168-69, emphasis added. *See also United States v. Anderson,* 859 F.2d 1171, 1177 (3d Cir.1988) (holding that an officer's pat-down search of the occupants of a car was reasonable after the officer observed large amounts of money on the front seat,

became suspicious that it might be drug money, and was concerned for his safety "because persons involved with drugs often carry weapons"); *United States v. Johnson,* 364 F.3d 1185, 1194- 95 (10th Cir.2004) (concluding that a weapons frisk was permissible "[b]ecause [the officer] reasonably suspected that Johnson might be involved in drug dealing, kidnapping, or prostitution,' which are crimes "typically associated with some sort of weapon, often guns"); *State v. Butler,* 353 S.C. 383, 577 S.E.2d 498 (S.C.App. 2003) (citing *Sakyi* for the same proposition); and *Lowe v. Commonwealth,* 33 Va.App. 656, 536 S.E.2d 454 (2000) (citing *Sakyi* for the same proposition.

6. Regardless of any other consideration, it is not entirely clear from the evidence that the pat down search caused the discovery of the baggie of drugs. Completely omitted from Owens' petition is the fact that Officer Kilgore did not discover the drugs during the frisk. Instead, he saw the baggie in plain view after it fell from Owens' pocket. Owens has not shown causation by establishing that the police officer's discovery of the drugs resulted from the *Terry* frisk, as shown by the officer's testimony:

> Prosecutor: Was he [Owens] emptying his pockets at your request?
>
> Officer Kilgore: No, sir, he did them on his own.
>
> Prosecutor: Okay. **Had you already done the *Terry* frisk**?
>
> Officer Kilgore: **Yes, sir.**

(VR No. 1, 05/03/05, 13:30:07 through 13:30:16, emphasis added). From Officer Kilgore's testimony, the baggie was not discovered because of the pat down search but simply because the baggie fell onto the ground while Owens was voluntarily emptying his pockets. The *Terry* frisk was complete at the time. Without showing some causal link or nexus between the *Terry* frisk and the discovery of the drugs, Owens' argument must fail. As such, Officer Kilgore properly arrested Owens after seeing the baggie in "plain view." *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

In the case at bar, Officer Kilgore testified that he arrested the driver, Thornton, for possession of a crack cocaine pipe and that he performed a pat down search of Owens, the passenger, to ensure that he had no weapons. During the pat down search, Owens removed money from his pockets and, apparently accidentally, dropped the baggie of drugs. Officer Kilgore properly arrested Owens after seeing the baggie of drugs on the ground, which at that point, was in "plain view." *Coolidge v. New Hampshire.*

II. AND III.

THE ISSUE IS NOT "WELL PRESENTED" IN THIS CASE.

In his petition, Owens argues, "The issue in conflict is well presented by this case." (Petition, p. 17). There is no doubt that the various jurisdictions have conflicting views of the "automatic companion" rule. However, the Commonwealth disagrees with Owens' argument that the issue is "well presented" in this case

because Officer Kilgore observed the drugs fall on the ground, despite whether the stop and frisk was proper. Officer Kilgore testified that, after he had completed the *Terry* frisk, Owens then reached into his right front pocket and pulled out money. (VR No. 1: 10/31/05; 10:30:26). As he lifted his right hand, a small baggie containing three blue tablets and two green tablets fell onto the ground. (VR No. 1: 10/31/05; 10:30:28, 10:37:20). Thus, Officer Kilgore observed the drugs in plain view, and independent of the *Terry* frisk. Officer Gilpin, who had arrived as backup, picked up the baggie from the ground. (VR No. 1: 10:31/05; 10:34:43). This case also involves the application of the plain view exception to the warrant requirement.

Stated differently, the present case does not present a "clean" use of the "automatic companion" rule, because there was at least one independent ground (i.e. the plain view exception to the warrant requirement) upon which the seizure of the baggie of drugs could have been based. If this court were to grant *certiorari,* the Commonwealth will argue that, regardless of the question as to whether the stop and frisk was constitutional, the police officer did not discover the drugs during the frisk. Instead, Owens himself dropped the baggie onto the ground, and Officer Kilgore observed the baggie in plain view. In *Thigpin v. Roberts,* 468 U.S. 27, 29-30 (1984), this court ruled, "Although the court below and the petition for *certiorari* addressed only the double jeopardy issue, we may affirm *on any ground that the law and the record permit* and that will not expand the relief granted below." (emphasis added) *quoting United States v. New York Telephone Co.*, 434 U.S. 159, n. 8, (1977).

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to deny the petition for writ of *certiorari*.

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IN THE

Supreme Court of the United States

KEITH A. OWENS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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INTRODUCTION

The Commonwealth of Kentucky does not contest that the decision below deepened a widespread and entrenched conflict—one that has evenly split six federal courts of appeals, and divided the courts of at least a dozen states, *see* Pet. 6-13—over an important issue of federal constitutional law: whether the so-called automatic companion rule comports with the Fourth Amendment. Opp. 13. Indeed, the Commonwealth concedes that it has "no doubt that various jurisdictions have conflicting views of the 'automatic companion' rule." *Id.*

The Commonwealth nonetheless opposes certiorari, arguing primarily that this case is an inappropriate vehicle because of a purported "independent ground" upon which the judgment below "could have been based." Opp. 13-14. This contention is simply incorrect; there is no available alternative ground.

The Commonwealth's claimed alternative ground is that certain disputed testimony below, if credited, *could have* supported a finding that the evidence at issue was in plain view—*i.e.*, that it was not discovered as a result of the contested frisk of Petitioner. Opp. 14. But the state courts declined to resolve the factual dispute in the Commonwealth's favor, and the Kentucky Supreme Court addressed the case squarely on the basis that the evidence *was* discovered as a result of the frisk. This Court would have no basis for making its own findings on this disputed factual issue. Accordingly, the Commonwealth's claimed alternative ground for affirmance simply does not exist.

ARGUMENT

I. RESPONDENT'S OPPOSITION CONFIRMS THE EXISTENCE OF THE DEEP SPLIT IDENTIFIED IN THE PETITION.

The Commonwealth's opposition confirms the existence of an entrenched and widening conflict among the lower courts, both state and federal. Indeed, the Commonwealth expressly says it has "no doubt that various jurisdictions have conflicting views of the 'automatic companion' rule." Opp. 13.

On one side of this divide, the Fifth, Sixth, and Eight Circuits, and at least six state courts, have concluded that the Fourth Amendment and *Terry v. Ohio*, 392 U.S. 1 (1968), reject the automatic companion rule and require individualized reasonable suspicion. Pet. 7-10 (citing cases). These courts apply "traditional Fourth Amendment analysis," addressing the existence of individualized suspicion under "the 'totality of the circumstances.'" *United States v. Bell*, 762 F.2d 495, 499 (6th Cir. 1985).

In contrast, the Seventh and Ninth Circuits have endorsed the automatic companion rule, as have Kentucky and the courts of at least six other states. Pet. 10-13 (citing cases). The Fourth Circuit has also articulated and followed the rule, albeit without complete consistency. *See* Pet. 11-12.

In short, the split in the lower courts over the automatic companion rule is deep, acknowledged, and enduring, and the decision below undeniably exacerbates this important conflict.

II. RESPONDENT'S PURPORTED ALTERNATIVE GROUND IS NONEXISTENT.

The Commonwealth argues that certiorari is inappropriate because an "independent ground" exists "upon which the seizure of the baggie of drugs could have been based." Opp. 14. Specifically, the Commonwealth contends—based on the testimony of the officer who frisked Petitioner—that Petitioner voluntarily emptied his pockets, and in doing so, dropped the bag to the ground, where the officer could observe it in plain view. *Id.*

This is not a viable alternative ground, because it rests on a disputed question of fact that both the trial court and the Kentucky Supreme Court declined to resolve in the Commonwealth's favor. Indeed, the Kentucky Supreme Court specifically noted that the officer's account conflicted with Petitioner's "testi[mony] that the officer reached into his pockets," and further observed that the officer's testimony was itself "seemingly contradictor[y]." Pet. App. 3a.[1] Accordingly, the Kentucky Supreme Court began its opinion by saying it was "require[d]" to decide the question presented by the petition, Pet. App. 1a, and it resolved the question by "adopt[ing] the automatic companion rule," Pet. App. 9a.

---

[1] In any event, even had the lower court chosen to credit the officer's testimony that Petitioner emptied his own pockets, that would hardly have established that Petitioner's action was not, for Fourth Amendment purposes, a result of the officer's initiation of the challenged frisk. *See* Pet. App. 3a (according to officer, Petitioner emptied his pockets either during or immediately after frisk).

In short, the Commonwealth invites this Court to reexamine conflicting testimony and make its own factual findings, Opp. 13-14—something this Court plainly cannot and will not do, let alone as a basis for finding an alternative ground. Indeed, this Court has steadfastly refused to affirm on grounds "not relied upon below" that were not "*clearly*" supported by the record. *Farmer v. Brennan*, 511 U.S. 825, 850 (1994) (emphasis added); *see also Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990) (holding that "nothing in the record" permitted the Court to affirm on alternative ground pressed by respondent); *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam) (record did not provide "a sufficient ground for affirming" judgment on an alternative basis). Even the Commonwealth's own cases recognize that this Court may affirm on an alternative ground only where "the law *and the record permit*." *Thigpin v. Roberts*, 468 U.S. 27, 30 (1984) (emphasis added) (citing *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)). In short, the Commonwealth's proffered alternative ground is illusory.

It is worth noting, moreover, that in every other way the Commonwealth's opposition confirms that this case is an unusually *good* vehicle for resolving the issue in conflict. As the court below explained, this is a case in which all of the actions leading up to the frisk are unchallenged, Pet. App. 4a, thereby putting the permissibility of the frisk squarely in issue, Pet. App. 6a. The Commonwealth confirms this point, emphasizing not only that the *propriety* of the officer's actions leading up to the frisk are

unchallenged, Opp. 3-9, but also that the *facts* leading up to the frisk are undisputed, *id.* at 5.

III. RESPONDENT'S MERITS ARGUMENT IS BOTH IRRELEVANT AND UNSOUND.

The Commonwealth additionally contends that the decision below was correct. Opp. 9-13.

This contention, however, provides no basis for denying certiorari. If anything, Respondent's defense of the automatic companion rule—arguing that officers "must" be permitted to frisk passengers without individualized suspicion, "for the purpose of protecting [the officers'] safety," Opp. 10—only underscores the importance of the question presented.

In any event, the Commonwealth's argument is incorrect. "Nothing in *Terry* can be understood to allow a generalized 'cursory' search for weapons . . . ." *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979). Indeed, this Court has made clear that a protective frisk must be based on a "reasonable belief or suspicion *directed at the person to be frisked*." *Id.* at 94 (emphasis added). It is only "[w]hen an officer is justified in believing that the *individual whose suspicious behavior he is investigating* . . . is armed and presently dangerous" that a protective frisk is constitutionally permissible. *Terry*, 392 U.S. at 24 (emphasis added).

Moreover, *Terry* made clear that a search premised on officer safety demands "specific and articulable facts" justifying what is "a severe, though brief, intrusion upon cherished personal security." *Id.*

at 21, 24-25. Indeed, "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Id.* at 22 n.18. The automatic nature of the Kentucky Supreme Court's rule is flatly to the contrary: the frisk of the passenger is based on the generalization that the companions of arrested drivers always pose a safety threat to arresting officers.

Nor has the Commonwealth offered any reason for departing from this Court's usual context-dependent approach, under which it has "generally eschewed bright-line rules in the Fourth Amendment context," *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997), and has expressly noted the inappropriateness of an automatic rule in performing the *Terry* analysis, *see Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983).

Finally, a key premise of the Kentucky Supreme Court's holding—that a *Terry* frisk may be considered a "minimal" intrusion, because "the passengers presumably have already been ordered to exit the vehicle," Pet. App. 11a—cannot be squared with *Terry*'s statement that a frisk is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Terry*, 392 U.S. at 17.

In short, the automatic companion rule is fundamentally inconsistent with this Court's precedents.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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